



The GSH

60-Second Memo

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The Five "W"s of Telling Someone They're Fired

By Laurie E. Meyer, Esq.

Whether a termination is because of misconduct or downsizing, no employer enjoys firing an employee. And while every termination decision brings with it the possibility of a lawsuit, legal risk can be reduced when the termination itself is handled in a straightforward, professional and dignified way.

This article assumes that you've made the decision to fire or lay off a particular employee and that you are satisfied that the case has been made to justify the termination or layoff. For example, you've determined that there are no limitations on your ability to terminate the employee, such as those contained in an employment contract or a collective bargaining agreement. Also, you're satisfied that legitimate, non-discriminatory reasons exist for the termination. If the termination is due to poor performance or conduct, you've ensured that the problems have been adequately documented and communicated to the employee, and that the employee has been treated consistently with other similarly-situated employees. If a downsizing is necessitated by an economic downturn, you've made sure that the downsizing process is well documented and that there is no intent to fill the

employee's position in the near future.

But even assuming all your ducks are in a row, it remains important to communicate the termination appropriately. A host of lawsuits challenging employee terminations demonstrates that a significant number of these challenges occur because the termination was poorly and/or inadequately communicated. So how should you break the news? That is, how do you communicate the termination decision in a way that reduces the likelihood that the company will be sued?

WHO should communicate the termination decision?

Ideally, the termination should be communicated to the employee by the manager or supervisor who made the decision, with a member of either upper management or human resources present. The termination interview should never be conducted alone, and it should not be conducted by someone who has not been trained on how to terminate employees safely and legally.

WHAT information should be communicated?

If at all possible, prepare an agenda for the meeting that includes what you're going to say and how you're going to say it. Be succinct, be straightforward, be candid, and, above all, be honest. If the employee's productivity level has been sub-par for an appreciable amount of time, or if the employee has failed to meet specific goals, say so in specific terms. Don't sugar-coat the decision in order to avoid hurting the employee's feelings by down-playing or omitting mention of performance deficiencies. Don't vaguely tell the employee that the company has "decided to go in a different direction." Don't try to shift "blame" by suggesting that "This is not my decision, but..." An employee who feels the employer is being cagey about the reasons for his or her termination is more likely to challenge the termination. In addition, if the employee later sues the company, inaccurate statements or reasons given to the employee may undermine the company's defense and may set up a claim that the company's stated reasons for its decision are pretextual.

Similarly, unless you can give specific examples, don't tell an employee he or she is being terminated for "poor attitude" or "insubordination." Without detail, these words can be misinterpreted as code words for discrimination or retaliation.

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Recognizing the intensity inherent in most employment termination meetings, it is important to listen to the employee and answer questions he or she may have. However, do not engage in a debate.

Finally, know what the employee is owed in terms of wages, vacation or other paid time off, commissions, bonuses, etc., and advise the employee when he or she will receive his or her final paycheck. Remind the employee of any obligations remaining to the company, such as the return of keys, uniforms or other company property. Remind the employee of any covenant-not-to-compete and his or her continuing obligation to keep trade secrets confidential.

WHERE should the meeting occur?

The termination is best handled in a face-to-face meeting, not over the phone or by letter. In most circumstances, an office or conference room that is away from the eyes and ears of co-workers and that is free from distractions is the best location for the meeting. A caveat: you may need to assess the risk of violence if the termination is due to aggressive or violent conduct on the part of the employee, and hold your termination meeting in a place that is safe.

WHEN should the termination occur?

Because of the importance of what you say and how you say it during a termination interview, don't fire someone when you are angry. While there are certainly some egregious offenses that trigger immediate termination, it is often preferable to suspend the employee, and handle the termination meeting when you can control both the timing and tenor of the meeting.

In the case of a planned termination, it is usually best to conduct the termination interview at the end of the work day or at another time when fewer co-workers are present. If possible, ask the employee to remain after work, when most employees have left for the day.

HOW should the termination be communicated?

Use a calm, professional tone. While you can express sympathy for the employee, do not diverge from the honest reasons for the termination. Handle the termination with an eye toward allowing the employee to leave the company with his or her dignity intact. If violence or other

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aggressive behavior is not likely to be an issue, avoid escorting the employee out of the building, especially by security personnel. If the company has concerns about possible theft or sabotage of company property or computer data files, make all attempts to safeguard these concerns without drawing undue attention to the employee's termination (e.g., IT personnel can restrict the employee's access to computer networks.)

By communicating your termination decision clearly and respectfully, you can help keep emotions cool, and possibly even avoid a lawsuit.

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